

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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P.T. TODAY, INCORPORATED, BRAD  
PUTVIN, GORDON ALLEN, BARBARA  
JOHNSON, ROBERT BAKER, MICHAEL  
BEAVAIS, KAREN LEHMAN BORIN,  
MARGARET KAMENEC, TERENCE HEATON,  
TERESA HERLINGER, RICHARD MILDER,  
ELAINE COOPER, JIM SIMPSON, JANET  
WISENIEWSKI, WILLIAM ROTH, LANA  
BAUM, TIMOTHY BONDY, TIMOTHY  
STEGEMAN, and MARK BEISSEL, P.T.,

Plaintiffs-Appellants,

v

BLUE CROSS & BLUE SHIELD OF  
MICHIGAN,

Defendant-Appellee.

UNPUBLISHED  
July 20, 2001

No. 211294  
Wayne Circuit Court  
LC No. 96-639660-NZ

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SHEILA ISLES, P.T., DAVID GILBOE, P.T.,  
DIANA INCH, P.T., PARUL SHAH, P.T.,  
BARBARA HERZOG, P.T., SANDRA JENKINS,  
P.T., OSA JACKSON-WYATT, P.T., JOHN  
CZARNECKI, P.T., RICHARD A. KOHLER,  
P.T., JEROME MALONE, MARTIN  
KATENBERG, P.T., RICHARD FEBY, P.T.,  
MARY ANN KOENING, P.T., and JEFFREY  
GREEN, P.T.,

Plaintiffs-Appellants,

and

GARY GRAY, P.T., LOREN DEVINNY, P.T. and  
KEER OOSTOCK, P.T.,

Plaintiffs,

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v

BLUE CROSS & BLUE SHIELD OF  
MICHIGAN,

Defendant-Appellee.

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No. 211309  
Wayne Circuit Court  
LC No. 97-715529-NZ

P.T. TODAY, INC., BRAD PUTVIN, GORDON  
ALLEN, BARBARA JOHNSON, ROBERT  
BAKER, MICHAEL BEAVAIS, KAREN  
LEHMAN BORIN, MARGARET KAMENEC,  
RICHARD MILDER, ELAINE COOPER, JIM  
SIMPSON, TERENCE HEATON, TERESA  
HERRLINGER, JANET WISENIEWSKI,  
TIMOTHY BONDY, TIMOTHY STEGMAN,  
MARK BEISSEL, DAVID GILBOE, DIANA  
INCH, BARBARA HERZOG, SANDRA  
JENKINS, RICHARD FEBY, MARY ANN  
KOENIG, JEFFREY GREEN, OSA JACKSON-  
WYATT, JOHN CZARNECKI, RICHARD A.  
KOHLER, JEROME MALONE, SHEILA ISLES,  
PARUL SHAH, MARTIN KATENBERG,  
WILLIAM ROTH and LANA BAUM,

Plaintiffs-Appellants,

and

WILHELMAS MEARS,

Plaintiff,

v

COMMISSIONER OF THE OFFICE OF  
FINANCIAL & INSURANCE SERVICES,

Defendant-Appellee.

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No. 215795  
Ingham Circuit Court  
LC No. 98-088083-CZ

Before: Hoekstra, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

The individual plaintiffs in these consolidated cases are Michigan licensed independent physical therapists.<sup>1</sup> In all three cases, plaintiffs' central complaint is that defendant Blue Cross & Blue Shield of Michigan (BCBSM) unlawfully discriminated against independent physical therapists by reimbursing them for the health care services they provided at rates much lower than those BCBSM paid hospitals for the same physical therapy services. In Docket Nos 211294 and 211309, plaintiffs sued BCBSM for declaratory and injunctive relief alleging various discriminatory, illegal and unauthorized BCBSM actions in violation of its enabling statute, the Nonprofit Health Care Corporation Reform Act, MCL 550.1101 *et seq.* In Docket No. 215795, plaintiffs sued the Commissioner of the Office of Financial & Insurance Services seeking declaratory relief, specifically that the Commissioner order BCBSM to cease its discriminatory, illegal and ultra vires conduct. In Docket Nos 211294 and 211309, the Wayne Circuit Court granted BCBSM summary disposition of plaintiffs' claims, and in Docket No. 215795 the Ingham Circuit Court granted the Commissioner summary disposition of plaintiffs' claims. We affirm.

## I

In all three cases, plaintiffs challenged BCBSM's refusal to permit state licensed independent physical therapists to become participating provider members of its Physical Therapy provider class. BCBSM created a separate class of providers, the Rehabilitation Therapy provider class, that encompassed independent physical therapists. Plaintiffs claimed discrimination by BCBSM, asserting that the Rehabilitation Therapy provider class plan offered reimbursement for services at rates far below the rates set within the Physical Therapy provider class plan for the same services, and imposed prerequisites to the independent physical therapists' participation with BCBSM that the Physical Therapy provider class plan did not require. According to plaintiffs, BCBSM's application of its Rehabilitation Therapy provider class to independent physical therapists and its failure to otherwise reimburse independent physical therapists for the services they provided constituted violations of the NHCCRA and usurpations of the state's authority to license health care providers. Plaintiffs asserted that the NHCCRA vested the Commissioner with the authority and duty to order that BCBSM cease its violations of the Act. Plaintiffs warned that BCBSM's unlawful conduct and the Commissioner's failure to halt it endangered the viability of independent physical therapy practices and adversely affected the NHCCRA's goals to provide subscribers readily available, cost effective, quality health care. MCL 550.1102(1).

In Docket Nos 211294 and 211309, plaintiffs' complaint set forth one count of declaratory and injunctive relief seeking to require BCBSM to refrain from violating the NHCCRA and discriminatorily refusing to reimburse independent physical therapists for their services, and a second count alleging BCBSM's tortious interference with plaintiffs' business interests because BCBSM's unjustified refusal to reimburse independent physical therapists forced the independent physical therapists to turn away patients who were BCBSM subscribers.

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<sup>1</sup> In Docket No. 211294, named plaintiff P.T. Today, Inc. is a nonprofit corporation, in which the individual plaintiffs were members, that promoted responsible physical therapy practice in Michigan.

The Wayne Circuit Court ultimately dismissed consolidated Docket Nos 211294 and 211309, granting BCBSM summary disposition of plaintiffs' complaint apparently on the basis that plaintiffs did not have standing to bring their claims against BCBSM.<sup>2</sup>

Two days after their claims against BCBSM were dismissed, plaintiffs in the Ingham Circuit Court filed the complaint against the Commissioner involved in Docket No 215795. As indicated above, this complaint generally repeated plaintiffs' prior allegations regarding BCBSM's unlawful, discriminatory conduct toward independent physical therapists, and requested declaratory and injunctive relief. The complaint prayed that the Ingham Circuit Court declare BCBSM's conduct unlawful and issue an injunction requiring the Commissioner to enforce and monitor BCBSM's compliance with the law. The Ingham Circuit Court granted the Commissioner summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(4), (8) and (10). The court concluded that no injunction ordering action by the Commissioner would issue because (1) the NHCCRA contained no provision imposing on the Commissioner a duty to order that BCBSM immediately cease and desist its allegedly discriminatory conduct, and (2) while plaintiffs previously had sought the Commissioner's review of BCBSM's Rehabilitation Therapy provider class plan the requested review was premature. The court further concluded that plaintiffs were not entitled to declaratory relief because no controversy existed, noting the Commissioner's indication that he intended to review BCBSM's rehabilitation therapy provider class plan and take plaintiffs' complaints into account to the extent provided within the NHCCRA.

## II

We need not spend an inordinate amount of time or space analyzing plaintiffs' claims against BCBSM regarding the illegality of its rehabilitation therapy provider class plan according to the NHCCRA. This Court has held on more than one occasion that health care providers do not have standing to sue BCBSM directly for alleged violations of the NHCCRA. *Genesis Center, PLC v BCBSM*, 243 Mich App 692, 693-696; 625 NW2d 37 (2000); *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698; 552 NW2d 919 (1996). Because all of BCBSM's conduct that forms the basis of plaintiffs' requests for declaratory and injunctive relief constitutes asserted violations of the NHCCRA, i.e., BCBSM's discriminatory participation requirements and reimbursement amounts and practices, we conclude that the Wayne Circuit Court properly granted BCBSM summary disposition of the first count of plaintiffs' complaint pursuant to MCR 2.116(C)(8).<sup>3</sup>

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<sup>2</sup> The Wayne Circuit Court also found that the issues raised in plaintiffs' complaint already had been decided in a prior Ingham Circuit Court action by the Attorney General and Michigan Physical Therapy, Inc. against BCBSM. Because our disposition of this case does not demand that we analyze whether collateral estoppel precluded the bringing of plaintiffs' claims, we do not address this issue.

<sup>3</sup> Although the trial court did not cite MCR 2.116(C)(8) in dismissing plaintiffs' claims, we will not reverse when the trial court reaches a correct result. See *Estes v Idea Engineering & Fabricating, Inc.*, 245 Mich App 328, 337; \_\_\_ NW2d \_\_\_ (2001).

### III

Plaintiffs also contend that the Wayne Circuit Court improperly dismissed their tortious interference claim against BCBSM. After reviewing the record de novo, we conclude that the court properly dismissed the claim for tortious interference with plaintiffs' business expectancies pursuant to MCR 2.116(C)(10) because BCBSM was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Even assuming that plaintiffs possessed legitimate expectancies regarding the opportunity to provide physical therapy services to certain individuals, and that BCBSM must have had some knowledge that its application of its physical therapy provider class plans would interfere with plaintiffs' expectancies, we find that plaintiffs nonetheless failed to demonstrate that BCBSM improperly intended any interference.<sup>4</sup> "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Michigan Podiatric Med Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989), quoting *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 779; 421 NW2d 289 (1988), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). The interference with a business relationship must be improper, that is illegal, unethical, or fraudulent, in addition to being intentional. *Michigan Podiatric Med Ass'n, supra*. Beyond characterizing BCBSM's conduct as discriminatory based solely on the alleged NHCCRA violations, however, plaintiffs neither showed BCBSM's commission of a per se wrongful act nor demonstrated with specificity affirmative acts by BCBSM that corroborate its alleged improper motive for interfering with plaintiffs' business expectancies. *BPS Clinical Labs, supra* 699; *Michigan Podiatric Med Ass'n, supra*.

### IV

Plaintiffs also challenge the Ingham Circuit Court's dismissal of their complaint against the Commissioner in Docket No. 215795. Plaintiffs argue that the court improperly determined that plaintiffs failed to exhaust their administrative remedies because NHCCRA subsection 1619(3) authorizes plaintiffs to bring their claims against the Commissioner. In addition, plaintiffs claim that the court incorrectly found that no actual controversy existed because the class plan review undertaken by the Commissioner was limited and did not afford plaintiffs an adequate remedy. We find, however, that the trial court correctly dismissed plaintiffs' complaint against the Commissioner.

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<sup>4</sup> The elements of a tortious interference with business relationship claim include (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship on the part of the defendant interferer, (3) an intentional interference causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Michigan Podiatric Med Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 735; 438 NW2d 349 (1989).

In another case brought by health care providers against the Commissioner seeking to make him end alleged violations of the NHCCRA by BCBSM, this Court recently rejected arguments very similar to plaintiffs'. In *Genesis Center, PLC v Financial & Insurance Services Comm'r*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 219867, issued 6/29/01), the plaintiffs, a freestanding outpatient surgical facility and its physician-owners, sued the Commissioner seeking to require him to stop BCBSM's allegedly discriminatory application of its ambulatory surgical facility provider class plan that violated the NHCCRA. The plaintiffs claimed that the ambulatory surgical facility provider class plan contained an illegal evidence of need (EON) criterion and that BCBSM discriminated by applying the EON criterion against freestanding surgical facilities because they were not owned by hospitals. *Genesis Center v Comm'r*, *supra* at slip op pp 1-3. On appeal, this Court affirmed the trial court's grant of summary disposition to the Commissioner because the plaintiffs did not exhaust their administrative remedies and because no case of actual controversy existed. *Id.* at 5. We note, significantly, that in *Genesis Center v Comm'r* as in this case, by the time this Court heard the appeals the Commissioner had undertaken review of BCBSM's challenged provider class plans according to the review procedure set forth within the NHCCRA. *Genesis Center v Comm'r*, *supra* at 4, 6.

After reviewing the NHCCRA and plaintiffs' specific claim that the circuit court had jurisdiction to declare BCBSM's conduct to be illegal and to enjoin such conduct, we conclude that the court lacked jurisdiction over the matter because plaintiffs failed to exhaust their administrative remedies. . . . [T]he Legislature explicitly directed the insurance commissioner to regulate and supervise nonprofit health care corporations like BCBSM. MCL 550.1502(2) . . . . *Although plaintiffs are correct in stating that § 619(3) allows them to bring an action in Ingham Circuit Court, we do not believe that § 619(3) allows the circuit court to conduct the same type of review that the insurance commissioner has authority to conduct under the NHCCRA.* The circuit court would be exceeding its authority if it were to conduct a comprehensive review of the provider class plan as plaintiffs requested in this case. *Instead, we read § 619(3) as presenting an appropriate avenue by which the circuit court can compel the insurance commissioner to enforce the NHCCRA, e.g., to conduct a provider class plan review to determine if BCBSM is discriminating against non-hospital owned surgical facilities.*

Requiring the exhaustion of administrative remedies in the present case fulfills several purposes of the doctrine: (1) an untimely resort to court may result in delay and disruption of an administrative scheme; (2) any type of appellate review is best made after the agency has developed a full record; (3) resolution of the issues may require the technical competence of the agency, and (4) the administrative agency's settlement of the dispute may render a judicial resolution unnecessary. *For example, as demonstrated in the insurance commissioner's determination report of BCBSM's provider class plan, the expertise and technical competence of the insurance commissioner's office was required to resolve the issues in this matter.* The report was over thirty-eight pages in length with attachments and presented an overview of the provider class plan, a summary of

testimony regarding the issues from numerous individuals, including providers, a comparison of all statewide licensed ambulatory surgical providers against those that had been granted participating provider status by BCBSM, and various findings and conclusions by the insurance commissioner. Any action by the circuit court in this matter may have delayed the insurance commissioner's review process and interfered with the commissioner's duty under the NHCCRA to prepare a determination of the provider plan that ultimately serves as a record for subsequent appeals. *Further, contrary to plaintiffs' assertion, the insurance commissioner's report did address the substantive issues raised by plaintiffs concerning BCBSM's alleged misconduct, including BCBSM's denial of participating provider status to non-hospital owned ambulatory surgical facilities.*

We also conclude that no actual controversy existed in this case. . . .

*. . . Plaintiffs failed to prove an actual controversy because the provider plan review process set out in MCL 550.1509 through 1518 . . . provides plaintiffs with the ability to preserve their legal rights. A further declaration by the circuit court was unnecessary to protect plaintiffs' rights. [Genesis Center v Comm'r, supra at 6-8 (emphasis added) (some citations and footnotes omitted).]*

The Court therefore granted the Commissioner summary disposition pursuant to MCR 2.116(C)(4) and (10). *Genesis Center v Comm'r, supra* at 5-9.

We similarly conclude in this case that plaintiffs prematurely resorted to the Ingham Circuit Court for consideration of their allegations regarding BCBSM's Rehabilitation Therapy provider class plan instead of pursuing the Commissioner's review of the plan prescribed by the Legislature within NHCCRA § 1509. We further conclude that the Ingham Circuit Court properly found no case of actual controversy here because the Commissioner agreed to review BCBSM's plan, and was required to consider plaintiffs' allegations concerning the plan, pursuant to § 1509. We note that the record reflects that the statutory review procedure continues to this day.<sup>5</sup>

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<sup>5</sup> On July 2, 1999, the Commissioner issued a forty-one page determination report concerning BCBSM's Rehabilitative Therapy provider class plan. In formulating his report, the Commissioner took into account public hearing comments made by several individual plaintiffs and plaintiffs' counsel. The Commissioner ultimately ordered no change in the plan by BCBSM. Although the Commissioner determined that the plan "did not substantially meet the quality of care or cost goals, a change in the plan is not required because . . . there has been competent, material and substantial information obtained or submitted to support a determination that the failure to achieve all of the goals was reasonable, due to factors listed in Section 509(4)." MCL 550.1510(1)(b). The Commissioner's determination was appealed to an independent hearing officer (IHO), pursuant to MCL 550.1515. The IHO held hearings and received exhibits and testimony, eventually on August 30, 2000 reversing the Commissioner's determination that the Rehabilitation Therapy provider class plan complied with the NHCCRA. Pursuant to MCL 550.1518, both the Commissioner (Docket No. 230016) and BCBSM (Docket No. 230017)

(continued...)

V

Lastly, we conclude that the Ingham Circuit Court properly rejected plaintiffs' request for an order compelling the Commissioner to order that BCBSM cease and desist its alleged violations of the NHCCRA because "the commissioner had no clear legal duty under the NHCCRA to issue a cease and desist order and because the statutory review proceedings present an alternate and adequate remedy." *Genesis Center v Comm'r, supra* at 9.

We conclude that the Ingham Circuit Court properly dismissed all of plaintiffs' claims against the commissioner according to MCR 2.116(C)(4) and (10).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Hilda R. Gage

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(...continued)

sought leave to appeal to this Court the IHO's decision. This Court granted leave to the Commissioner and BCBSM and consolidated their appeals, which remain pending before this Court.